No. 78-685

In the Supreme Court of the United States

OCTOBER TERM, 1978

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel.
KENNETH G. CAPLAN,
Deputy Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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OPINIONS BELOW

The court of appeals dismissed a petition to review a decision and order of the Interstate Commerce Commission without opinion (Pet. App. 13a). The decision and order of the Commission (Pet. App. 14a–74a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on July 25, 1975, and the petition for a writ of certiorari was filed on October 23, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether railroads may obtain judicial review of a decision by the Interstate Commerce Commission to hold down a portion of a proposed rail general revenue rate increase insofar as it applies to certain specified commodities.

STATEMENT

In September 1977 most of the Nation's railroads sought permission from the Interstate Commerce Commission to file a master tariff generally increasing their freight rates and charges by an average of five percent, subject to certain exceptions. The railroads argued that the rate increase was necessary to offset increases in the cost of operation (Pet. 3).

The Commission permitted the carriers to file the master tariff, and more than 250 parties protested the increase. Finding that the proposed increase was "necessary to prevent a further decline in the railroads' overall financial condition" (Fort Howard App. at 16a), the Commission declined to suspend the tariff under the provisions of former Section 15(8) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 15(8).[1] The Commission started an investigation, however, of seven specific commodity groups[2] because of their high revenue/cost ratios (Fort Howard App. at 16a).

After completing the investigation, the Commission found that the railroads had failed to justify the full five-percent increase with respect to the seven investigated commodities and that the increase should be limited to three percent for five of those commodities and two percent for two of them (Pet. App. 35a–36a). The Commission ordered the railroads to cancel the tariff schedules found unlawful, to stop collecting the higher rates on the specified commodities, and to make required refunds (Pet. App. 68a). It authorized the railroads to file on short notice new tariff schedules reflecting increases no greater than those found to be justified (Pet. App. 69a).

Petitioners sought judicial review of the Commission's order with respect to the investigated commodities. The Commission moved the court of appeals to dismiss the petition on the ground that the agency's order is not reviewable. The court of appeals granted the motion to dismiss (Pet. App. 13a).

[1] The Interstate Commerce Act was recently revised, codified, and enacted as Subtitle IV of Title 49, United States Code. Act of October 17, 1978, Pub. L. No. 95–473, 92 Stat. 1337. Section 15(8) was recodified as 49 U.S.C. 10707. Section 3(a) of the recodification act, 92 Stat. 1466, provides that the restatement of prior laws "may not be construed as making a substantive change in the laws replaced." For purposes of clarity, we refer to the statutes by their former designations.

[2] Newsprint paper; sodium alkalies; industrial gases; sulphuric acid; rubber; manufactured iron or steel; and recyclables. The Commission investigated recyclables because it has a continuing responsibility under Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 40 (now 49 U.S.C. 10731) (the "4R Act"), to consider the effect of general rate increases on recyclables. See Pet. App. 57a. See also *National Association of Recycling Industries, Inc.* v. *ICC*, 585 F. 2d 522 (D.C. Cir. 1978), pet. for cert. pending, No. 78–872.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Although the courts have not previously considered the issue presented in this case, the general principles governing the availability of judicial review of the Commission's order have long been established. There is a recognized distinction between review of the ordinary mechanism for seeking and obtaining increases in rail carrier rates and review of the mechanism used in this case, which is known as a "general revenue proceeding."

Under the Interstate Commerce Act, the ordinary means by which a rail carrier increases its rates is by filing a new tariff under Section 6(3) of the Act, 49 U.S.C. (1976 ed.) 6(3). The carrier must give 30 days' notice to the Commission and the public, and the tariff "shall plainly state the changes proposed to be made in the schedule then in force * * *." Thus, under the usual procedure, a carrier submits a new tariff proposing to increase, in a specified amount, the rates for handling a specified commodity or commodities between specified points. Under Section 15(8) of the Act, 49 U.S.C. (1976 ed.) 15(8), when a new tariff is filed the Commission may institute a hearing to determine the lawfulness of the new rates and may (with certain exceptions) suspend the effectiveness of the new rates for as much as 10 months. In any such hearing the burden of proof is on the carrier to establish the lawfulness of the new rates. If, at the conclusion of the

hearing, the Commission finds the rates to be unlawful, it must order the carrier to refund any amounts paid to it that were found to be unlawful. A determination by the Commission that a proposed new rate is lawful or unlawful is "final" and subject to judicial review. 28 U.S.C. 2342(5).

In contrast to the ordinary means of obtaining rate increases, the Commission and the courts have long permitted many carriers, acting jointly, to file tariffs proposing general "across-the-board increases applicable to all or nearly all of their rates" on the ground that the average, system-wide costs and revenues of all of them necessitate the general increase sought. *Aberdeen & Rockfish R.R.* v. *SCRAP,* 422 U.S. 289, 311 (1975) (*"SCRAP II"*). Although the Commission has the same power under Section 15(8) to investigate the lawfulness of such proposed increases, to suspend them, or both, its investigation (known as a "general revenue proceeding") focuses on the average costs and revenue needs of the carriers as a whole rather than on the circumstances of a particular carrier or the costs of transporting a particular commodity between particular points. See generally *SCRAP II, supra,* 422 U.S. at 311–314.

In view of the nature of general revenue proceedings, the courts have established several principles governing their reviewability. First, if the Commission determines that a general increase is justified on the basis of system-wide costs and revenues and permits it to go into effect, a line of decisions commencing with *Algoma Coal and Coke Co.* v. *United*

States, 11 F. Supp. 487 (E.D. Va. 1935), holds that a shipper may not seek judicial review of that determination on the ground that the increase, as applied to a particular commodity or commodities, is unjust and unreasonable. The theory of that principle is that a general revenue proceeding does not focus on the circumstances pertaining to particular commodities, carriers or routes (although it may incidentally consider them), but focuses instead on system-wide costs and revenues. A shipper that believes itself aggrieved by the increase as it applies to particular commodities, routes or carriers has an adequate remedy under Section 13(1) of the Act, 49 U.S.C. (1976 ed.) 13(1), which authorizes it to file a complaint and to require the Commission to engage in a particularized inquiry into the lawfulness of the rate as applied to particular commodities. See *SCRAP II, supra,* 422 U.S. at 314–316. Any decision by the Commission resulting from such a complaint then is subject to judicial review.

One corollary of that principle is that if the Commission denies a requested general increase, or authorizes it in a lesser amount than requested, a carrier may not seek judicial review on the ground that, apart from its justification on a system-wide basis, the requested increase was just and reasonable as applied to particular commodities or his own particular circumstances or rates. Such a carrier's recourse is to use the ordinary mechanism of the Act; *i.e.,* to file a tariff under Section 6(3) pertaining to those specific commodities and his own circumstances, and thus to trigger a particularized inquiry that may be judicially reviewed.

In this case the Commission approved the requested general five percent increase as applied to most commodities, but it approved a lesser increase as applied to seven particular commodities on the ground that the evidence indicated that, as applied to those commodities, the requested rate increases would be unreasonable and that the carriers had not submitted cost and revenue data to show otherwise (Pet. App. 33a, 36a).

The Commission' decision to "hold down" a general increase on certain commodities is not unusual.[3] And the judgment of the court of appeals that that decision is not reviewable is reasonable. The effect of the non-reviewability of the Commission's decision is simply that if carriers desire an increase with respect to those commodities, they may not use the summary procedures of a general revenue proceeding, but must use the ordinary tariff procedures of the Act. That is, they must file tariffs under Section 6(3) pertaining to those particular commodities and, in any ensuing hearing on those tariffs, must defend them with cost and revenue data pertaining specifically to the movement of those commodities. Judicial review must await the conclusion of that proceeding.

Several considerations support the reasonableness of that result. First, when carriers elect to employ a master tariff and initiate a general revenue proceeding, the Commission, although it looks primarily to system-wide costs and revenues, is not required to close its eyes to the possible or probable effects of

[3] See pages 10 and note 7, *infra.*

the requested general increase on particular commodities. This Court recognized that fact in *SCRAP II, supra,* 422 U.S. at 313–314, and petitioners do not contend otherwise. See also *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 652–654 (1978) (describing the Commission's decision to suspend new tariffs as based on a "tentative" judgment about the dividing line between reasonable and unreasonable rates). If the Commission does consider those effects, but nevertheless approves the general increase for all commodities, including those specifically considered, shippers may not seek judicial review of the consideration given to specific commodities, but must invoke the complaint procedures of Section 13(1). *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D. D.C. 1970), aff'd, 401 U.S. 967 (1971). Indeed, the carriers have consistently asserted that shippers may not seek judicial review of increases approved in general revenue proceedings on *any* basis, and thus would presumably contend that shippers could not seek review on the basis of any claim that the two and three percent increases approved in this case with respect to the seven commodities was too high.[4] It is not unreasonable to

[4] Thus, carriers have consistently contended that shippers may not obtain judicial review of a general revenue proceeding even when their claim is that the Commission erred in concluding that across-the-board costs and revenues warrant a requested general increase. See Pet. 7–8; *SCRAP II, supra,* 422 U.S. at 317 n.18. The United States and the Commission have not endorsed that extreme view; in our view a decision by the Commission that general revenue needs do or do not warrant a general rate increase in

require the same result with respect to carrier claims that those authorized increases were too low.[5]

Second, the fact that the result of the Commission's order is to authorize a general rate increase of five percent on most commodities and a two or three percent increase on seven commodities does not alter the character of the proceeding as a general revenue proceeding or change the principles governing judicial review. In fact, the carriers have frequently sought general rate increases that similarly differentiate among the increases sought for different commodities.[6] Thus, for example, the Commission's proceeding in *Increased Freight Rates, 1968* (*Ex Parte No. 259*), 332 I.C.C. 714 (1969), was a general revenue proceeding initiated by a master tariff proposing "increases that ranged generally from 3 to 10 percent, de-

a general revenue proceeding is final and reviewable, since that is the principal issue that such a proceeding addresses. (This Court has reserved that question. See *SCRAP II, supra,* 422 U.S. at 317 n.18.) But our contention that determinations concerning particular commodities in a general revenue proceeding is not reviewable by either shippers or carriers is consistent with that position. The carriers' contention here, however, is not consistent with the position they have consistently urged and to which they apparently adhere. See Pet. 7–8.

[5] Whether the carriers here are actually seeking judicial review on the ground that the authorized increases were too low is not clear. See Pet. 5 and discussion at pages 11–12, *infra.*

[6] In *SCRAP II* the Court recognized that a general revenue proceeding may be initiated by a proposed rate increase that is not uniform with respect to all of the rates charged by the carriers: "In those cases, the railroads have, in the exercise of their initiative, proposed across-the-board increases applicable to all *or nearly all* of their rates." 422 U.S. at 311 (emphasis supplied).

pending upon the commodity involved." *Atlantic City Eelectric Co.* v. *United States,* 306 F. Supp. 338 (S.D. N.Y. 1969), aff'd by an equally divided Court, 400 U.S. 73 (1970). The Commission permitted the proposed increases to go into effect, and the courts, at the carriers' urging, held that shipper claims that the rates were unreasonable as they pertained to particular commodities were not reviewable. *Atlantic City Electric Co.* v. *United States, supra; Electronic Industries Association* v. *United States, supra; Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1969), aff'd by an equally divided Court, 400 U.S. 73 (1970). If carriers, in the exercise of their rate-making initiative, can seek and obtain a general rate increase that differentiates among the rates sought for different commodities and that is not reviewable at the instance of shippers, it is reasonable to conclude that the Commission may also distinguish among commodities when it partially approves a requested general increase, that its decision to differentiate is not reviewable, and that carriers, like shippers, must institute further proceedings under the Act to obtain a reviewable decision.[7]

[7] Furthermore, petitioners are incorrect in asserting (Pet. 17–20) that the Commission's decision in this case to hold down a requested increase as to certain commodities is a departure from prior practice. For example, in *Increased Freight Rates* (*Ex Parte No. 259*), *supra*, the Commission authorized increases as to some commodities but not as to others. See also *Increased Freight Rates and Charges, 1972* (*Ex Parte No. 281*), 341 I.C.C. 290 (1972); *Increased Freight Rates, 1970 and 1971* (*Ex Patre Nos. 265, 267*), 339 I.C.C. 125, 257–258 (1971); *Increased Freight Rates,*

Third, the general revenue proceeding is a summary one often carried out on an abbreviated record. The Commission's decisions necessarily are based on less than complete information about particular commodities; it cannot bring to individual rate proposals made as part of a general revenue increase the same study that it can afford when the rate proposals are made individually in filings under Section 6(3). The Commission's decision here thus ultimately is no more than that the railroads did not carry their burden of showing, in the context of a general revenue proceeding, that the five percent increases on the seven commodities were just and reasonable. A renewed filing of individual tariffs would permit additional scrutiny and the creation of a factual record more suitable for judicial review.

2. In any event, whether the Commission's decision is subject to judicial review is a question that does not warrant this Court's review in this case.

First, petitioners have not clearly presented the issue either here or in the court of appeals. Petitioners do not appear to seek judicial review of the Commission's determination that, on the basis of the evidence before it, rate increases of more than two or three percent would be unlawful. Rather, they state (Pet. 5):

> The railroads' petition for review [in the court of appeals], as their related motion

1967 (*Ex Parte No. 256*), 332 I.C.C. 280, 344–346 (1968); *Increased Freight Rates* (*Ex Parte No. 206*), 300 I.C.C. 633, 687–691 (1957). The carriers, however, did not seek judicial review of those hold-downs in those proceedings.

papers made clear, challenged the Commission's Ex Parte 343 order on the grounds that it contained an interpretation of the new and important rate provisions of the 4–R Act which is clearly erroneous and which threatens the ability of the railroads to respond in the only way that they can to the inflationary impact of the economy, that the Commission failed adequately to explain its departure from prior norms, and that the Commission in its procedure for investigation of the selected commodity groups acted arbitrarily and deprived the railroads of due process of law.

Contrary to their assertion, petitioners have not "made clear" what determinations they are requesting the courts to review or why those determinations are appropriately reviewed in the context of a general revenue proceeding, which they have consistently maintained is not subject to review on any basis. Moreover, if petitioners are contending that, regardless of the merits of the Commission's decision to limit the requested rate increase on certain commodities and otherwise to approve it, the Commission's incidental expressions of policy must be reviewed now because they would otherwise escape review, they are incorrect.[8] Under 49 U.S.C. (1976 ed.) 13(6) a person may petition the Commission to start a rulemaking pro-

[8] Furthermore, it is difficult to see the connection between the Commission's statements concerning the 4R Act (see note 2, *supra*) and its decision. The Commission's order noted that it had for some time questioned the merits of general revenue proceedings and that the "tenor, purpose, and policies of the 4R Act ratemaking provisions necessitate a de-emphasis of the role of the general

ceeding in a rail matter. If the Commission denies the petition or fails to act within 120 days, the petitioner may bring a civil action in a court of appeals. The court may order the Commssion to start the rulemaking if it is necessary and if failure to take the requested action "will result in the continuation of practices that are not consistent with the public interest or are not in accordance with [the Act]." Here, too, the railroads have available a special administrative remedy that they have not yet invoked.[9]

Second, there is no conflict among the lower courts on the reviewability issue that the railroads appear to present. In fact, as far as we know, this is the first time the railroads have sought judicial review of a Commission order in a general revenue proceeding, and it is uncertain whether their access to the courts in such cases is likely to be an issue of recurring importance.

increase in railroad ratemaking" (Pet. App. 16a). But it went on to note that the 4R Act does not preclude general rate increases and that such increases serve one of the policies of that Act (*id.* at 18a–20a). And what it *decided* in this case was to *permit* a general increase, in the full amount requested as to most commodities, and in a lesser amount as to some commodities. Petitioners do not explain why, given that decision, review of the Commission's incidental expressions of policy is necessary or appropriate. This Court reviews judicial judgments, not administrative opinions, and review thus should wait, at a minimum, until the Commission's expressions make a difference in its holding.

[9] The Commission is giving thorough consideration to the 4R Act in other proceedings. See, *e.g.*, *National Association of Recycling Industries, Inc.* v. *ICC*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General.
MARK L. EVANS,
General Counsel.
KENNETH G. CAPLAN,
Deputy Associate General Counsel,
Interstate Commerce Commission.

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